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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 336

WILLIAM PAUL KRUEGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on April 21, 1964.

CITATIONS TO OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, infra, pp. 8-14, is unreported at this time.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on April 21, 1964. Rehearing was denied on June 1, 1964. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether the inordinate and intemperate use of the charge of conspiracy, by the United States Government, deprives petitioner of his rights under the due process clause of the Constitution.

2. Whether there is a conflict in both fact and law in the judgment of the District Court for the Western District of Missouri as affirmed by the United States Court of Appeals for the Eighth Circuit and the judgment of the District Court of California in United States v. Corlin, 44 F. Supp. 940.

STATEMENT.

Petitioner and four other Defendants, Joe Hanlin, Larry W. Thornton, Clovis N. Ooley, and Don Garrison, were charged on October 9, 1961, in a Twenty-Eight (28) Count Indictment. The first twenty-seven counts alleged violations of Section 1341, Title 18, U. S. C., with devising a scheme to defraud purchasers of vending machines and with using the mails for the purpose of affecting the scheme. Count Twenty-eight (28) alleged violation of Section 371, Title 18, U. S. C., with conspiracy to use the mails to execute a scheme to defraud.

Defendant, Hanlin, pleaded not guilty to all counts on October 16, 1961. On October 20, 1961, the other four defendants, including Petitioner, pleaded not guilty to all counts. On March 19, 1962, Defendants Ooley and Garri-

son withdrew their pleas of not guilty as to Counts 1 and 28, and pleaded guilty thereto: the Government stated all other counts would be dismissed at time of sentencing. On March 23, 1962, Defendant Hanlin withdrew his plea of not guilty as to Counts 1 and 28 and pleaded guilty thereto: the Government stated all other counts would be dismissed at the time of sentencing. On June 22, 1962, Defendants Ooley and Garrison were sentenced and Counts 2 through 27 were dismissed as to each.

The remaining two Defendants, Petitioner and Thornton, were tried in the District Court for the Western District of Missouri, from September 17, 1962 to September 26, 1962. At the conclusion of the trial the Government dismissed Counts 9, 12, 15, 20, 22, 25, and 27. The jury acquitted Defendant Thornton as to all remaining counts and acquitted Petitioner as to all counts except 3, 13, 19, and 21, on which he was found guilty. Petitioner was found not guilty on the conspiracy count No. 28. The four counts upon which Petitioner was convicted had to do in each instance with sales made by him individually or while in the company of Defendant Thornton and in each instance was supported by the mailing of materials either from Defendant Hanlin to one of the purchasers or from one of the purchasers to Hanlin. A timely notice of appeal was filed by your Petitioner and the judgment was affirmed on April 21, 1964.

REASONS FOR GRANTING THE WRIT.

1. In the instant case, Petitioner was joined by the charge of conspiracy to Defendants Ooley and Garrison. In this fashion, Respondent was able to introduce into evidence any and all statements made by Defendants Ooley and Garrison and the transactions or sales, and the following losses, that occurred. The only connection shown by the Government between these two Defendants and your

Petitioner was through Defendant Joe Hanlin. He being the manufacturer or fabricator of the vending machines in question. There was never any showing of any meeting or knowledge of Defendants Ooley and Garrison and your Petitioner. Defendant Hanlin was called by Respondent as their witness, and his credibility vouched for by the United States, and it was his testimony that the people who sold for him, including Defendants Ooley and Garrison and your Petitioner, did so strictly on an agency relationship. He did not instruct them how to sell nor in any fashion told them where they might or might not sell or for that matter who else might be selling for him. Further, his testimony was that he gave blank contracts, some pictures and a price for his units or machines to all of his salesmen and nothing more.

In spite of this, the trial court refused to grant Petitioner's motion for a directed verdict of acquittal on Count 28, the conspiracy count, at the conclusion of Respondent's case and that all evidence introduced with reference to Defendant Ooley and Garrison should be stricken from the record.

Therefore, without any competent evidence of conspiracy the jury was allowed to retire to consider their judgment of Petitioner, having before them all the inflammatory material with reference to Defendants Ooley and Garrison. For discussion of the quagmire the United States Government has placed your Petitioner and other Defendants, there is a discussion of it in "Procedural Safeguards for the Mass Conspiracy Trial", by Milton R. Wessel of the New York Bar, printed in the American Bar Association Journal, July 1962, Volume 48, No. 7. With reference to this problem, the District Court of New York stated, "membership in a conspiracy must be determined without regard to and independently of the statements and declarations of others and must be

determined from the evidence of alleged member's own conduct and declarations and his own connection with the actions and conduct of others" (United States v. Foster, 9 F. R. D. 367); and in United States v. Stromberg, 268 F. 2d 256, certiorari denied. It is your Petitioner's contention that the Government is attempting to do by sheer weight of numbers that which it cannot do properly against your Petitioner. For an expression of the view that the Courts have overly diluted the reasonable doubts standard by permitting cases to go to the jury where there is merely substantial evidence to support a verdict of guilty (see Goldstein, The State and the Accused; Balance of Advantage in Criminal Procedure, 1960, 69 Yale L. J. 1149, 1152-1178).

2. Clearly, the question presented is of importance in the administration and procedural safeguards for those indicted under the conspiracy statutes. Your petitioner suggests that the position of the District Court Judge of California in 1942 the case of United States v. Corlin, 44 F. Supp. 940, is the sounder position. That case and this in many respects are very similar, including the use of the contract and allegations made by salesmen in contradiction of said contract; the indictment of both the salesmen and the owner; the testimony of one of the owners on behalf of the Government; alleged false representations, et cetera. In the Corlin case, tried by the Court without a jury, it was stated, "In the prosecution for using mails to defraud in connection with sales of club memberships, the existence of a scheme to defraud should not be inferred from mere similarity of promises and representations by salesmen when acting individually." It is your Petitioner's contention that the factual situation in the instant case would certainly merit this type of consideration. That Court said further in regard to that case—"The scheme to defraud is pleaded in Count 1 and is embodied by reference, in the preamble

of every count to the indictment. And the indictment, in each count, charges not separate Defendants with a scheme to defraud and the mailing of the particular letter, but each and all of them. The individual sale, through the use of the mails, to be criminally actionable, must refer back to the scheme. In a verdict which would find certain Defendants guilty only as to certain transactions which they handled would, in itself, negate the existence of the scheme. For if there be a fraudulent scheme to which the Defendants were knowingly parties, each is liable for the act of the others. . . . . (Citations.) On the other hand, if each defendant is guilty only in relation to the sale which he made, then we have not one scheme but as many schemes as there are defendants. Individual representations, unrelated to each other, and not a part of a scheme to defraud, cannot be given the dignity of a scheme to defraud. (Rude v. U. S., 1935, 10 Cir.; 74 F. 2d 673.)" The Court continued further in this vein pointing up another similarity in the factual situation of the instant case and the Çorlin case "except in instances where two salesmen worked together, there is no showing of any concert of action by the salesmen with one another, or with the owner defendant. And clearly, a scheme to defraud cannot be inferred from mere similarity of promises by persons who have no responsibility to each other." And further, the Court said, "if there were misrepresentations, they were separate and individual misrepresentations of different persons employed at different times. (Rude v. U. S., supra.) Each acting for himself, made without authority of the other defendants and in direct repudiation of the positive limitation of authority which the owner defendant, for his own protection, had caused to be inserted in the contract . . . At best, they were in essence, matters punishable by local state law."

In conclusion, I refer the Court to the case of U. S. v. Maghinang, D. C. Del. 1953, 111 F. Supp. 760, in which

the Court said, "to deny Defendant's motion for judgment of acquittal in criminal case based on circumstantial evidence, defendant's guilt must be the only reasonable hypothesis from such evidence, and if there is any other reasonable hypothesis, defendant is entitled to such judgment, though guilt may also be a reasonable hypothesis."

CONCLUSION.

For the foregoing reasons, this Petition for writ of certiorari should be granted.

Respectfully submitted,

MERLE L. SILVERSTEIN,
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Clayton 5, Missouri,
Counsel for Petitioner.

Date: July 1, 1964

APPENDIX A.

OPINION OF COURT OF APPEALS.

United States Court of Appeals
For the Eighth Circuit.

No. 17,233.

William P. Krueger, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[April 21, 1964.]

Before Van Oosterhout, Ridge and Mehaffy, Circuit Judges.

Ridge, Circuit Judge.

William Paul Krueger, along with four other persons, was charged in twenty-seven counts of a twenty-eight count indictment with the substantive offense of using the mails to defraud (Section 1341, Title 18, U. S. C. A.) and in Count 28 with conspiracy (Section 371, Title 18, U. S. C. A.). The allegation as to use of the mails charged in each count of such indictment was related to a scheme or artifice to defraud, covering a period "prior to October 1957, and continuing to on or about the 20th day of May, 1958." The activities of the fraud and conspiracy

charged were specifically related to a scheme and artifice to defraud purchasers and prospective purchasers of coin vending machines warranted for use in the dispensing and sale of cigarettes or ballpoint pens.[1]

Appellant and one Larry W. Thornton stood trial on such charges. Thornton was found not guilty on all counts of the indictments submitted to the jury for consideration as to him. Appellant was found guilty by jury verdict on Counts 3, 13, 19 and 21, charging substantive offenses, *ante*. The other defendants, Clovis N. Ooley, Don Garrison and Joe Hanlin, each entered pleas of guilty before trial to Counts 1 and 28 of the indictment. The other counts thereof were dismissed as to them at time of imposition of their sentence.

Appellant was sentenced to two years on each count of the indictment on which he was found guilty, to run concurrently. He, alone, prosecutes this appeal. Inasmuch as concurrent sentences were so imposed, and the quantum of sentence thereof is less than might have been assessed under any single count as to which appellant was found guilty, "an affirmance is dictated if the evidence was sufficient to sustain the conviction under any one count." **Johnson v. United States**, ... F. 2d ... (8 Cir., 1964); **Slocum v. United States**, and **Eaton v. United States**, 325 F. 2d 465.

Joe Hanlin and his wife were the owners of ninety-nine per cent of the stock of Hanlin Manufacturing Company and Midwest Manufacturing Company. Neither company had a plant or any physical equipment. At all times here considered, such companies alternatively acted as jobbers

[1] Petitioner was accused of attempting to sell, by means of false and fraudulent pretenses, both cigarette and ballpoint vending machine equipment. As the counts under which he was found guilty pertain only to sales of cigarette vending machines, we limit our discussion solely to that item.

of cigarette vending machines, but the sales here appraised were made in the name of "Midwest". Petitioner was one such salesman, who contacted prospective purchasers answering advertisements appearing in local papers, similar to that appearing in the footnote.[2] Hanlin was in sole charge of the office of both the above companies. His arrangements with salesmen employed by him were uniform. He purchased the vending machines for $60.00 each and sold them to the salesman for between $70.00 and $80.00 apiece. The salesman sold the machine to purchasers for $195.00 to as much as $210 apiece; thereby receiving approximately a sixty per cent commission, less freight charges which were paid by the salesman. As a sale was closed, a signed contract, with a cashier's check, was obtained and sent by the salesman through the mail to Hanlin, who took out his share and mailed the remainder to the man responsible for the sale. The contract was entered into in the name of one or the other of Hanlin's companies, but usually through Midwest; and contained a guarantee for one year that each machine was free of faulty construction, with any necessary cost of repairs to be made thereto during that time, assumed by Midwest. The evidence established a complete failure on the part of Midwest to live up to such warranty.

Hanlin gave very little instruction to salesmen employed by him. In the main, he told the salesmen they should first get the purchaser acquainted with the vending machine business and its money-making potential; the amount

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[2] "Reliable party wanted, male or female, to service route of cigarette machines. No selling or soliciting. Route established for operator, full or part time. Substantial income per month to start. $1,095.00 to $2,190.00 cash required. Please don't waste our time unless you have the necessary capital and are sincerely interested in expanding. We finance expansion. If fully qualified and able to take over at once write briefly about yourself and include number for personal interview. Midwest Manufacturing Company. Write Box MM 44 care of Orange Leader."

a purchaser could earn by the purchase of ten or more units, depending on location which Midwest would establish. He also provided them with photographs of the vending machine and contracts to be executed by the purchasers. Otherwise, the salesmen were fairly much on their own. Without going into details, the four purchasers to whom appellant admittedly sold ten machines each, were given a "sales pitch" as to the quality of the machines; where they were to be located by Midwest; the profits to be derived therefrom, ranging from $100.00 to $300.00 a month; and, that tobacco companies would pay placement fees of $20.00 per location to the purchaser; all of which was established to be false. Of course, the machines were represented to the purchasers as being of good quality and trouble-free. As it turned out, most all of them were imperfect. Cigarettes could be obtained from them without using coins; and when coins were inserted, cigarettes would not be ejected. One purchaser, a Mr. Manchac, testified he did not receive the same machine shown to him by appellant in a photograph. Complaints were continuously received by Hanlin as to the mechanical problems of the machines. Hanlin, himself, testified he had not heard of anyone making money on the machines as his salesmen represented. Concededly, the mails were used in the execution of the scheme to defraud.

Nevertheless, it is appellant's primary contention before us, that the District Court erred in overruling his motion for acquittal made at the close of all the evidence; since the use of the mails as established by the evidence was merely "incidental, not anticipated," and was not an integral part of the scheme charged. The letters which are the basis of the counts on which appellant was found guilty are set forth in the footnote.[3] The letters relating

[3] Count 3: December 27, 1957: "Dear Mr. Courtner. Our location man will probably be in Topeka the first week in January. We

to Counts 3 and 13 were sent by Hanlin to purchasers Courtner and Vester, after the full purchase price for the vending machines was received by Midwest. As to Counts 19 and 21, the letters were sent to purchasers Manchac and Hardcastle. It is apparent on the face of the last two letters that acknowledgment of partial payment was first made and thereafter it was stated: "On completion of your contract we will process your order and ship" the machines.

In the light of the above-stated facts and other matter revealed in the evidence, we can find no merit in appellant's reliance on **Kann v. United States**, 323 U. S. 88 (1944) and **Parr v. United States**, 363 U. S. 370 (1960); nor in the argument made by him to the effect that the money received by appellant and the use of the mails as here considered, in nowise aided or abetted the execution of the fraudulent scheme charged. But, even if appellant's argument so made in respect to Counts 3 and 13 *supra*, may be said to have some merit (a fact which we need not presently sound out), the evidence clearly establishes

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will take care of the location just as soon as possible. Thanking you again for this order, we are, Sincerely yours, Hanlin Mfg. Co."

Count 13: March 30, 1958: "Dear Mr. Vester. We are shipping your units this week, via motor freight prepaid. We know of no reason why you should not fulfill your part of the contract. Machines are paid for and we will deliver and locate, and live up to our contract 100 percent. Sincerely yours, Midwest Manufacturing Co., Joe Hanlin."

Count 19: April 2, 1958: "This will acknowledge your order for 10 cigarette units and your check for $1,390. On completion of your contract, we will process your order and ship via motor freight, prepaid. Thanking you for your order, we are, Sincerely yours, Mid West Manufacturing Co., Joe Hanlin."

Count 21: April 2, 1958: "Dear Sir. This will acknowledge your order for 10 cigarette units along with your check for $2,100.00. On completion of your contract, we will process your order and ship prepaid in about 10 days. Thanking you for your order, we are, Sincerely yours, Mid West Manufacturing Co., Joe Hanlin."

that the letters sent, as charged in Counts 19 and 21, *supra*, acknowledged only partial payment by the purchasers named therein. Manifestly, those letters were sent to and received by those purchasers of machines to whom such letters were personally addressed, to lull them into a false sense of security prior to the final consummation of the sales made to them. Appellant's argument that such letters were merely "incidental and an unanticipated use of the mails," is illusory and unsound.

It was established that the above letters were mailed and sent in the usual course of Hanlin's business, as appellant knew they would be. The mailing and receipt of either such letter, standing alone, under the facts here established is sufficient to sustain the conviction and sentence imposed under either Count 19 or 21. Cf. **United States v. Sampson,** 371 U. S. 75 (1962); **Parr v. United States,** *supra*, l. c. 390; **Pereira v. United States,** 347 U. S. 1, 8 (1954); **Badders v. United States,** 240 U. S. 391 (1916); **Butler v. United States,** 317 F. 2d 249, 256 (8 Cir. 1963).

That the mailing of such letters was not "merely incidental and collateral to the fraudulent scheme" charged, but was a step in the plot to perpetrate such fraud and to avoid detection, is the only reasonable inference to be made from the evidence in the case at bar. Cf. **Adams v. United States,** 312 F. 2d 137, 140 (5 Cir. 1963); **United States v. Kenofskey,** 243 U. S. 440 (1917). Very apparently, the jury so considered the same.

Appellant's contention that his trial court erred in permitting Hanlin to testify that he had pleaded guilty to the same offense for which petitioner was on trial, is without merit. Particularly is this so, since no objection was made to such testimony at the time the remark was elicited and no motion was made to strike the same. Cf. **Goodman v. United States,** 273 F. 2d 853, 859 (8 Cir. 1960); **Slocum v.**

United States, *supra*, l. c. 467; **Wood v. United States**, 27[illegible] F. 2d 359, 363 (8 Cir. 1960).

Appellant's final contention, that his trial court failed to charge the jury that "puffing or mere exaggeration in sales talk" did not constitute a criminal offense, is likewise without merit. He was not indicted for that offense. Cf. **Reistroffer v. United States**, 258 F. 2d 379, 392 (8 Cir. 1958).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1964

WILLIAM PAUL KEUSSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. II, 1-7) is reported at 331 F.2d 283.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1964 (Vol. II, 8). A petition for rehearing was denied on June 1, 1964 (Vol. II, 13). Mr. Justice Goldberg extended the time for the filing

of a petition for a writ of certiorari to July 31, 1964, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the jury's acquittal of petitioner on a conspiracy count required a new trial of the substantive counts for improper joinder of offenses and defendants.

STATEMENT

A 28-count indictment returned in the United States District Court for the Western District of Missouri charged petitioner and four others with mail fraud and conspiracy to commit mail fraud, in violation of 18 U.S.C. 1341 and 371, respectively (Vol. I, 1-18). Three co-defendants each pleaded guilty before trial to one substantive count and to the conspiracy count (Vol. I, 169, 170, 223-228, 234-235, 242, 269-270). After a jury trial, petitioner was found guilty on four substantive counts and acquitted of conspiracy and fourteen other substantive counts (Vol. I, 202-204).* He was sentenced to concurrent terms of imprisonment of two years on each of the counts and made eligible for parole under 18 U.S.C. 4208(a)(2) (Vol. I, 243). The court of appeals unanimously affirmed (Vol. II, 1-7, 8).

The pertinent facts may be summarized as follows:

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* Seven counts were dismissed at the trial on the government's motion (Tr. 1192).

From 1956 to 1958, co-defendant Hanlin was president of the Mid-west Manufacturing Company and the Hanlin Manufacturing Company of Kansas City, Missouri (Tr. 556, 557, 602). These corporations, which owned no plant or physical equipment, sold cigarette vending machines manufactured by another concern (Tr. 556-557).

During 1957 and 1958, petitioner and others worked as salesmen for Hanlin (Tr. 574-575). Hanlin, who paid the manufacturer $60 for each machine, sold the machines to the salesmen for $70 or $80 (Tr. 557-558). The salesmen, in turn, sold the machines to their customers for about $200 apiece and paid the freight charges and the installation costs (Tr. 558, 591-592, 596). Hanlin furnished the salesmen with printed contract forms and photographs of the machines (Tr. 558). The salesmen advertised the product and sold the machines to various individuals. The sales orders and checks for the purchase price were mailed to Hanlin (Tr. 558, 579), who filled the orders and shipped the merchandise (Tr. 558). After taking his share of the proceeds, Hanlin mailed the balance of the purchase price to the salesmen (Tr. 593).

During this period, petitioner sold a number of cigarette vending machines to individuals in various states. To one customer, petitioner identified himself as "Kirkpatrick" and, after showing photographs of the "De Lux" model, stated that each of those machines would earn $100 per month, and that the tobacco companies would pay the customer at least $20 per location (Tr. 413). The customer then purchased ten "De Lux" models, but the machines actually re-

ceived were not the same as those shown in the photographs (Tr. 410-411). Petitioner told another purchaser that his company sold vending machines at a loss but made its profit from money paid by a local tobacco distributor on sales of cigarettes (Tr. 509-510). He said that the purchaser would earn at least $200 per month (Tr. 511). Petitioner and a co-defendant "guaranteed" another purchaser an income of at least $100 per month and said that it could be as much as $333 if the machines were placed in good locations (Tr. 68). They represented that the machines would be easy to place because they were superior to others on the market (Tr. 70).

The orders for the machines and payments therefor (in the form of cashiers' checks) were mailed to Hanlin. Thereafter, Hanlin wrote to the purchasers acknowledging receipt of the orders and checks, indicating the anticipated dates of shipment, and providing other information (Tr. 76, 155, 157, 417, 513-514, 576-578). These letters were mailed as part of the routine of the business (Tr. 909 (62)).

The machines developed mechanical trouble almost as soon as they were placed on location (Tr. 157, 160-161, 164, 181, 190, 422-424, 518, 520). One purchaser had to remove all his machines within six days (Tr. 518, 520). Another said that the longest any machine remained on location was about two weeks, and that he finally gave them to a used metal distributor (Tr. 160-165). All the purchasers lost money on their investments (Tr. 164, 190, 424, 432-433, 517).

ARGUMENT

Petitioner contends (Pet. 3-7) that the government improperly indicted and tried him for conspiracy, and that as a result he was prejudiced by the introduction of otherwise inadmissible evidence. Apart from the fact that this contention was not raised below, and is not, therefore, available as a ground for reversal in this Court, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16, the point has no merit. In *Schaffer* v. *United States*, 362 U.S. 511, 516, this Court held that there was no "hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law." In the instant case, the interrelationship among Hanlin and his salesmen was so substantial that the jury could properly have found them all to have been engaged in one overall scheme to defraud the purchasers of cigarette vending machines and to utilize the mails in furtherance thereof. It was no bar to such a finding that each salesman did not participate in all of the individual frauds, or even that all the salesmen may not have known one another. *Blumenthal* v. *United States*, 332 U.S. 539, 556-558. That the jury chose to find petitioner guilty only on the counts charging his direct sales to customers did not establish, as a matter of law, that the conspiracy count was improper. For even under the dissenting views of *Schaffer* v. *United States*, *supra*, misjoinder is not established if a jury, notwithstanding evidence of conspiracy, finds certain joined defendants not guilty of that offense: "Once the conspiracy is supported by evidence, it presents

issues for the jury to decide. What may motivate a particular jury in returning a verdict of not guilty on the conspiracy count may never be known." 362 U.S. at 523-524. The jury in this case was able to differentiate among the substantive counts notwithstanding the evidence of conspiracy, as is demonstrated by its acquittal of the petitioner on the conspiracy charge and on a number of substantive counts.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1964

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